

SERVED: December 14, 1999

NTSB Order No. EA-4805

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 7th day of December, 1999

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JANE F. GARVEY,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket SE-14697
v.		)	
		)	
JAMES C. SHORTER,		)	
		)	
Respondent.		)	
		)	
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**OPINION AND ORDER**

Respondent has appealed from the initial decision of Administrative Law Judge Patrick G. Geraghty, issued on March 17, 1997.<sup>1</sup> The law judge, acting on cross motions for summary judgment, affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.7, 91.13(a), and 121.535.<sup>2</sup>

<sup>1</sup> The initial decision, and errata, are attached.

<sup>2</sup> Section 91.7 provides:

**§ 91.7 Civil aircraft airworthiness.**

(continued...)

We deny the appeal.

Respondent was pilot-in-command of a January 1, 1996 Boeing 747-100 Evergreen International Airlines flight from Jeddah, Saudi Arabia, to Riyadh, and then terminating in Dhahran. There were three crew on board -- respondent Shorter, his second officer/flight engineer, Craig Colton, and Arnani Papa, a flight mechanic. Prior to the flight (on December 27, 1995), the entire "B" system autopilot had been placed out of service by use of a DMI placard (and underlying logbook entry).<sup>3</sup>

During the flight to Riyadh, autopilot "A" began to exhibit problems. (In the record, they are termed "transient" problems and are not further described.) Respondent states that, after consulting with his crew, and after a review of Evergreen's MEL<sup>4</sup> provisions and the December 27<sup>th</sup> entry, they jointly determined to "apply power to the 'B' Autopilot for diagnostic purposes." Respondent's Affidavit at paragraph 7. According to respondent and Mr. Colton, see Affidavit at ¶ 8, and Respondent's Exhibit 17

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(continued...)

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

Sections 91.13(a) and 121.535 prohibit careless or reckless operations. Section 121.535 also sets forth various operational responsibilities of the pilot in command.

<sup>3</sup> Deferred Maintenance Item. A portion of the logbook entry read "deferred B auto-pilot." Respondent's Exhibit 5.

<sup>4</sup> Minimum Equipment List.

(Mr. Papa did not address this issue directly in his written statement), it functioned normally in all command modes that were selected. The B autopilot was again used on the flight to Dhahran and, again, it functioned normally. Id. On the ground at Dhahran, Mr. Papa signed the airworthiness release for the B autopilot. According to Mr. Papa, although the B autopilot was used in flight prior to its airworthiness release, it was not used "operationally" until after that release. Id. at paragraph 18 and Exhibit 16 to Respondent's Affidavit.

We agree with the Administrator that, on the record before us, she has satisfied her burden of proof. On appeal, respondent offers two theories to support his action: first, that the B autopilot was not used "operationally" on the flights, but was merely used "diagnostically" or was "functionally tested," which, he argues, is not prohibited; and, second, that Evergreen's written procedures not only do not prohibit the action, but countenance it.

Initially, and before reaching the merits of respondent's appeal, we note that respondent has not in this proceeding challenged the Administrator's underlying premise that the aircraft would be unairworthy if operated as it was. Respondent's appeal raises only the limited theories here identified, and it is our rejection of those theories that results in our affirming the Administrator's order. Our decision should not be read to reflect any independent determination of the airworthiness of an aircraft operated with one autopilot not

functioning and the other one placarded, as the record does not contain sufficient information on this point. See Administrator v. Copsey, NTSB Order No. EA-3448 (1991) (the test of airworthiness is whether the aircraft conforms to its type design or supplemental type design and whether it is in a condition for safe operation).

Turning to the matters respondent did raise, we cannot agree with either of his theories.<sup>5</sup>

Respondent's first argument merits little serious consideration. Whether "functional testing" is permitted inflight for MELED items need not be decided, as what occurred here was much more than testing. Respondent's Affidavit does not state exactly how long the B autopilot was in use, as compared to the length of the flights, but his Response to the Administrator's Cross Motion for Summary Judgment, at 6, states:

[I]n this fact pattern, Captain Shorter was confronted with having to fly this airplane on January 2, 1996, for 8 or 9 hours at high altitude where there is a fairly small margin between a "stick shaker" (stall warning) and high speed buffet, commonly referred to as the coffin's corner. Having to "hand fly" this aircraft for 8 or 9 hours in this environment would have been fatiguing at best and dangerous at worst.

This was far more than "testing." The B autopilot was used

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<sup>5</sup> Respondent also appears to raise a reliance argument: that it was Mr. Papa who requested that the B autopilot be activated to see if the earlier problems that led to the placard could be duplicated. This argument is not borne out by the crew statements in the record. We have no doubt that no check of the B system would have been done had the A system been operating properly. In any case, even if Mr. Papa requested a test, what occurred was much more. See infra.

for a considerable length of time based on a cockpit analysis of the earlier write-up and a cockpit analysis of the B autopilot's operation. In short, respondent tried the B autopilot, it *appeared* to work properly, and he continued to use it until they reached Dhahran. Further, he used it on two flight segments -- first, the remainder of the flight to Riyadh, and then after landing at Riyadh, for the entire flight from Riyadh to Dhahran.

We also reject respondent's arguments that are based on the wording of various manual provisions. The key item on which respondent relies is a statement in Evergreen's B-747 Operations Manual discussing MELs, that reads:

#### DMI PLACARDS

DMI placards shall be used to identify units, components or systems that are totally inoperative or partially inoperative and may or may not be used by the flight crew, depending upon the inoperative component.

Respondent's Exhibit 6. The same provision is repeated in the airline's General Operations Manual. Exhibit 7.

Respondent argues that the DMI language cited above allows crews to use parts of systems that are working properly. That is true, to a point. If the placard only places certain aspects of a system out of service, other aspects may be used independently. But that was not the case here, and it is not reasonable in our view for respondent to argue that it was. The simple facts are these: the B autopilot is a "system," and use of the B autopilot was prohibited. The entire B system, not merely some of its modes, was noted in the logbook as out of service and was placarded. This defeats respondent's claim that the modes that

worked could, according to the above paragraph, still be used.<sup>6</sup>

Under respondent's interpretation, the crew could independently determine that all or parts of a placarded system are working properly and use them. The autopilot system is a complex one. Whether or not it actually should have been placarded in part or in whole is not before us but, once the placard was in place, it should be obvious that it was beyond respondent's authority, and properly so, to decide, because an autopilot system *seemed* to work correctly, that it could be placed back in service. In fact, according to Mr. Papa's statement, he did not remove the placard and clear the logbook until they were on the ground in Dhahran.<sup>7</sup> Once on the ground, Mr. Papa made a "functional test" (Exhibit 16).<sup>8</sup> Mr. Papa's attempt to term the use of the B autopilot as "testing" was, in our view, his recognition that the B autopilot system should not actually be operated prior to his formal release (which is intended to reflect all the checks and diagnostics necessary to determine that the autopilot is, in fact, working properly).

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<sup>6</sup> Further, respondent does not argue that he only used certain of the autopilot's functions/modes that were segregated from the rest of the system to the extent that a reasonable person could conclude they could be operated safely.

<sup>7</sup> If Mr. Papa had issued the airworthiness release during the flight, the issues here would be different. But that case is not before us. Nor is it explained in the record why he did not issue the release while on the ground at Riyadh, the intermediate point.

<sup>8</sup> Mr. Papa's actions are not at issue in this proceeding and any discussion of them should not be taken as a determination they conformed to the regulations.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's airman certificates shall begin 30 days from the service date indicated on this opinion and order.<sup>9</sup>

HALL, Chairman, FRANCIS, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. HAMMERSCHMIDT and GOGLIA, Members, did not concur. Member GOGLIA submitted the attached dissenting statement, with which Member HAMMERSCHMIDT concurred.

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<sup>9</sup> For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).